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No. 39

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM 1987
No 39 Original

ROBERT A. NOBILE,

Petitioner,

-vs-

JOSEPH I. SCHINDLER, CHARLOTTE BIGLANE
NOBILE, UNITED MISSISSIPPI BANK,

Respondent.

**Appeal from Memorandum and Order
of the United States Court of Appeals
for the First Circuit, Boston
for No. 87-1635, Entered November 13, 1987,
and that
the Constitutional Rights under Amendment V
Have Been Denied**

ROBERT A. NOBILE

Pro Se

251 Hanover Street
Boston, Massachusetts 02113
(617) 523-6768

Petitioner

QUESTIONS PRESENTED

1. Whether the United States Constitution, Amendment V, can be ignored by a Federal Magistrate when appellants' Federal Magistrate appointed attorney would not act as directed by appellant in a due process request?

2. Whether the Magistrate upon notification by Appellant should and could have rectified the situation to insure that the due process clause of the Fifth Amendment was not defeated?

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Butler v. State, 217 Miss 40, 63 So.2d 779	6
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Wilkinson v. United States (1979) 441 U.S. 468, 99 S. Ct. 1829	8

CONSTITUTIONS, STATUTES AND RULES

U.S. Const. art. I
 U.S. Const. art. III
 U.S. Const. art. V
 28 U.S.C. § 636(c)(4);(5)
 28 U.S.C. § Title 28, Section 1291
 Federal Rules of Appellate Procedure, Rule 1(b)

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JOSEPH I. SCHINDLER, CHARLOTTE BIGLANE
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OPINIONS BELOW

The decision of the United States Court of Appeals for the First Circuit Memorandum and Order Entered November 13, 1987 is unreported and reproduced attached. The Court of Appeals allowed the motion to dismiss for mootness. The Court failed to address the issue on appeal presented that the Conversion of the Bankruptcy Court was in violation of the due process due to the admitted refusal by court appointed counsel to act on behalf of the plaintiff as directed. This allowed a commencement of the foreclosure proceeding since no timely appeal was filed by counsel appointed by the Court.

JURISDICTION

The United States Supreme Court is the Court of Appeal from the memorandum and order entered November 13, 1987, especially as to the question of violation of the due process provision of the United States Constitution Amendment V.

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS EXCERPTS

United States Constitution, Article I, Section 8: The Congress shall have power . . . to constitute tribunals inferior to the Supreme Court.

United States Constitution, Article III, Section 1: The

judicial power of the United States shall be vested . . . in such inferior courts as the Congress may from time to time ordain and establish.

United States Constitution, Amendment V: No person shall ... be deprived of life, liberty, or property, without due process of law...

United States Code, Title 28, Section 636(c)(4); (5):
Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court [Such c]ases...may be reviewed by the appropriate United States court of appeals petition for leave to appeal by a party stating specific objections to the judgement.

United States Code, Title 28, Section 1291: The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States.

Federal Rules of Appellate Procedure, Rule 1(b): These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.

Bankruptcy Code (11 U.S.C.A.) Amended October 1986, and related provisions of Code Titles 18 and 28, Bankruptcy Rules, Federal Rules of Civil Procedure, Rule 8002(a)

Ten-Day Period. The Notice of Appeal shall be filed within 10 days of the date of entry of the judgement, order or decree.

STATEMENT OF THE CASE

The Bankruptcy Court Judge appointed a counsel, to act on behalf of the estate of Robert A. Nobile. The Bankruptcy Court Judge converted the case from a Chapter 11 to a Chapter 7 case. The debt-in-possession required the court appointed counsel to file an appeal. The court appointed counsel would not act in accordance with the directive within the 10-day appeal time allowed. The Judge who appointed the counsel was unaware of this non-compliance to appeal until 90 days after conversion (December 1986). There was a hearing held immediately at which the counsel admitted that counsel failed to act though requested to act on the appeal. The Judge subsequently and immediately signed an order which allowed counsel to withdraw. The Judge failed to allow the 10-day appeal time allowed by the Rules of the Court.

The Judge's protection of the "due process" provision of United States Constitution Amendment V should have taken immediate actions to preserve and safeguard the individual and the Special Provision that "No person shall...be deprived of life, liberty, or property without due process of law...."

There was a filing made within the 10-day period after the judge granted counsel the right to withdraw as counsel by Robert A. Nobile acting "pro se." That appeal is still in process as case filing number U.S. District Court First Circuit Number 87-1544 MA and 87-1545 MA. The Appeal period of the 10-days allowed by the Rules was conferred upon an attorney and firm that would not act. Therefore there was no ability to act conferred upon anyone else until the counsel was allowed to withdraw. Clearly in a criminal matter the court has always held in facts similar to these that the appeal period would not run against the individual. Clearly, if the appellant Robert A. Nobile were to be allowed to act Court Appointed Counsel must remove itself as an impediment to the "due process" allowed by the Constitution. Robert A. Nobile acted timely upon such withdrawal by counsel but has still been denied the "due process" allowed by the United States Constitution, Amendment V.

SUMMARY OF ARGUMENT

In appeals involving conclusions of law and fact here, the rule in the United States Court of Appeals for the First Circuit operates to reduce appellate rights by precluding an appeal when the appellant has failed to file an appeal to a magistrate's order. That is flatly in conflict, therefore, with the constitutional right of "due process."

Moreover, the ruling contradicts both the express language of the constitution and the legislative scheme governing the relationship of magistrates to Article III judges and appeals. Indeed, through enforcement of the 10-day rule here, the United States Court of Appeals for the First Circuit has allowed the "due process" to be voided.

Beyond that, the ruling impairs the federal appeal as a right by countervailing that the interest of due process being narrowly served here, and irrationality treated differently. Thus the rules enforcement violates due process and the equal protection component of the Fifth Amendment.

ARGUMENT

I. The "Due Process" rules are absolute and cannot be ignored.

U.S.C. Amendment V: requires that a party sought to be affected by a proceeding shall have the right to raise issues or set up any defense [or Appeal] which he may have in the cause. Blakey v. Texas Business Investment Co., 12 Ariz. App. 390, 470 P.2d 710, Butler v. State, 217 Miss. 40, 63 So. 2d 779.

II. The Rule Compelling the 10-day period of the appeal was entrusted by the court to counsel who secretly from the court would not act.

The Court authorized and appointed counsel was an officer of the court clearly in the court's jurisdiction. The counsel failed to act "within ten days," therefore the time cannot run against Robert A. Nobile even the Bankruptcy Court had to clear the counsel out of the way upon realizing the situation 90 days later by allowing counsel "leave to withdraw."

By filing the appeal timely within 10 days of counsels withdrawal, a party has clearly indicated an unwillingness to waive the right to active and ultimate participation in the proceedings. No waiver of rights can be implied to this party under the United States Constitutional Amendment V "due process" by the timely appeal.

Absent some countervailing interest, due process demands that the fundamental right not be impaired. Bodie v. Connecticut, 401 U.S. 371 (1971). The only countervailing argument interest, however, is the more efficient elimination of the appellant's life, liberty, or property. Property must come secondly after "due process."

Attorneys that would not act as directed have even been disciplined by courts, by failure to take action in Bankruptcy

Proceedings Disciplinary Board of the Supreme Court, Petitioner v. Patrick S. O'Neill, Respondent 326 N.W. 2d 879 (N.D.). The courts strongly protect the client.

"The Court may also [even] grant an out of time petition for certiorari for the purpose of vacating a Lower Court's judgement and remanding the case..." Thus, in Wilkinson v. United States (1970) 398 U.S. 68," a pro se 17 months out of time. When the court-appointed attorney failed and refused to act to file a timely petition.

CONCLUSION

The judge in bankruptcy court erred by denying the right of appeal to the party involved here, thus ignoring the U.S. Constitution Amendment V.

Petitioner respectfully requests the court reverse and vacate the judgement of the United States Supreme Court of Appeals for the First Circuit and remand for a full allowance of the conversion appeal.

Respectfully submitted,

Robert A. Nobile
Pro Se

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APPENDICES

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September 26, 1986 12a

H. Order Authorizing to Employment
of Counsel under General Retainer
by United States Bankruptcy Court
District of Massachusetts
July 17, 1986 14a

APPENDIX A

MANDATE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1635

IN RE
ROBERT A. NOBILE,
Debtor

ROBERT A. NOBILE,
d/b/a/ NORTH SQUARE REALTY,
Plaintiff, Appellant,

v.

JOSEPH I. SCHINDLER, ET. AL.,
Defendants, Appellees

Before
Coffin, Breyer and Seyla,
Circuit Judges.

MEMORANDUM AND ORDER

Entered November 13, 1987

This is a motion to dismiss an appeal on grounds of mootness. Appellee United Mississippi Bank ("UMB") argues that appellant Robert A. Nobile's appeal of the denial of a motion to stay a foreclosure sale has been rendered moot on account of the occurrence of the sale. Nobile has filed no opposition to the motion to dismiss.

We review the background briefly. Nobile filed for bankruptcy under Chapter 11 in Jun, 1985. Among his alleged assets were interests in two oil wells. These interests were purchased with a loan from the UMB; the UMB secured its loan by a mortgage on the wells. UMB sought relief from the automatic stay imposed by the Bankruptcy Code so that it could foreclose on Nobile's debt. In September, 1986, after Five days of trial, a bankruptcy judge granted UMB relief from stay and, finding no prospect for rehabilitation of the estate in Chapter 11, ordered a conversion to Chapter 7. Nobile did not appeal that part of the order lifting the automatic stay.

The foreclosure sale was duly advertised in a local paper. On February 2, 1987 — the day before the sale was to take place — Nobile filed, in the bankruptcy court, an emergency motion to enjoin the sale. The bankruptcy judge denied the motion on grounds that Nobile lacked standing since a trustee had been appointed and that person was fully competent to

challenge any irregularities in the sale. Nobile appealed to the district court. That judge held that the trustee, and not Nobile, was responsible for protecting whatever interest the estate might have in the sale. The court noted as well that it had no jurisdiction over Nobile's emergency motion since the motion was, in effect, an (untimely) appeal of the bankruptcy court's September, 1986 decision lifting the automatic stay. The sale took place as scheduled. This appeal followed.

It appears that the issue of whether the district court was correct to refuse to enjoin the sale has been rendered moot by the sale's occurrence. See Markstein v. Massey Associates, Ltd., 763 F.2d 1325, 1327 (11th Cir. 1985) (when bankruptcy court lifts automatic stay, debtor fails to seek stay pending appeal and property is sold, court is powerless to rescind sale on appeal).

Even if this appeal were not moot, we would, on this record, affirm the district court's dismissal. Affirmance would be appropriate because of Nobile's failure to appeal the bankruptcy court's order lifting the automatic stay. His emergency motion was, in effect, an untimely notice of appeal: the relief sought — injunction against the sale — could, and should properly, have been requested by way of an appeal of the bankruptcy court's order. Thus the district court had no jurisdiction over the motion.

For the above-stated reasons, this appeal is dismissed.

By the Court,

Francis P. Scigliano
Clerk.

APPENDIX B

**UNITED STATES DISTRICT COURT
OF MASSACHUSETTS**

**Denial of Motion to Stop Sale
Movant Lacks Standing.**

Federal Judge

Robert Keeton

March 3, 1987

APPENDIX C

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

Emergency Motion to Stop Sale of Oil Well Interest

Denied "Movant Lacks Standing. There is a trustee in this case who is fully competent to deal with any irregularities in a foreclosure sale which was authorized after a full evidentiary hearing, and movant was represented by competent counsel."

Judge Harold Lavien

March 2, 1987

EXHIBIT D

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION**

In Re:

ROBERT A. NOBILE d/b/a
NORTH SQUARE REALTY
187-189 NORTH STREET
CONSTRUCTION COMPANY,
NOBILE OIL PROPERTIES,
A TO Z SUPPLY CO.,

Debtor

Chapter 7

Case No. 85-00615-HL

**ORDER AUTHORIZING WITHDRAWAL
OF COUNSEL TO DEBTOR**

At Boston, in said District, this 5 day of January, 1987.

This matter having come before me on December 30, 1986 by informal hearing at which the Debtor, Robert A. Nobile, was present and upon the motion of Guy B. Moss, Esq. and

Widdett, Slater & Goldman, P.C. to withdraw as counsel to the Debtor, and sufficient reason appearing to me therefor, and after hearing Mr. Moss, Mr. Nobile and Steven Hoort, Esq., counsel to Charlotte Nobile, and without intending to prejudice the position of the moving parties that they were not as a matter of a law counsel to Mr. Nobile personally after entry of an order in this case convertising it to one under Chapter 7, it is hereby:

ORDERED, that Guy B. Moss, Esq. and Widdett, Slater & Goldman, P.C. be, and they hereby are, authorized to withdraw as counsel of record to Robert A. Nobile.

(Harold Lavien)

Harold Lavien

Bankruptcy Judge

EXHIBIT E

In Re:

ROBERT A. NOBILE d/b/a
NORTH SQUARE REALTY
187-189 NORTH STREET
CONSTRUCTION COMPANY,
NOBILE OIL PROPERTIES,
A TO Z SUPPLY CO.,

Debtor

Chapter 7

Case No. 85-00615-HL

December 30, 1986

DENIED — The conversion order followed a full and well-presented evidentiary hearing at which debtor's position was vigorously and capably presented by counsel. For counsel's position on appeal, see hearing of December 30, 1986.

H.L.

(Judge Harold Lavien)

EXHIBIT F

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS**

In Re:

ROBERT A. NOBILE d/b/a
Debtor

Chapter 7
Case No. 85-00615-HL

ORDER

TO: Guy B. Moss, Esquire
Widett, Slater & Goldman
60 State Street
Boston, MA 02109

James M. Langan, Esquire
Langan, Dempsey & Brodigan
84 State Street
Boston, MA 02109

This morning's hearings on Mr. Nobile's claim for exemption and an administrative claim were continued until January 12, 1987 at 2:30 P.M. The matter involved is technical and it did not appear appropriate for Mr. Nobile to appear without counsel. Since both of you may be considered to be his counsel and neither have requested nor had approved a

withdrawal, but recognizing that there may be some confusion when dealing with an individual who is in Chapter 11 over whether one represents the debtor-in-possession as distinguished from the debtor when they are the same individuals, the Court is scheduling a conference on December 30 at 11:30 A.M., at which you are both required to be required to be present so that without prejudice to either Mr. Nobile or counsel, this matter of representation may be determined.

Dated and entered at Boston, in said District, on the 23 day of December, 1986.

(Harold Lavien)

HAROLD LAVIEN

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT G

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS**

In Re:

ROBERT A. NOBILE d/b/a
NORTH SQUARE REALTY
187-189 NORTH STREET
CONSTRUCTION COMPANY,
NOBILE OIL PROPERTIES,
A TO Z SUPPLY CO.,

Chapter 7

Case No. 85-00615-HL

Debtor

ORDER ON MOTION TO CONVERT

The Motion To Convert Case filed by Charlotte Biglane Nobile having come on for hearing following notice to creditors and parties in interest, and the Court having found after a hearing that a conversion of this case to a case under Chapter 7 would be in the best interests of creditors and the estate, and for cause shown as set forth in subsections (1), (2), and (3) of 11 U.S.C. § 1112(b):

IT IS HEREBY ORDERED that this case under Chapter 11 is hereby converted pursuant to 11 U.S.C. § 1112(b) to a case under Chapter 7 of the Bankruptcy Code.

Entered at Boston in
this District this
26 day of September, 1986
By the Court

(Harold Lavien)
Harold Lavien
Chief Bankruptcy Judge

EXHIBIT H

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION**

In Re:

ROBERT A. NOBILE d/b/a
NORTH SQUARE REALTY
187-189 NORTH STREET
CONSTRUCTION COMPANY,
NOBILE OIL PROPERTIES,
A TO Z SUPPLY CO.,

Debtor

Chapter 11

Case No. 85-00615-HL

**ORDER AUTHORIZING EMPLOYMENT
OF COUNSEL UNDER GENERAL RETAINER**

At Boston, in said District, this 17 day of July, 1986.

This matter having come before me on the Debtor's Application for Authority to Employ Counsel Under General Retainer and Affidavit of Proposed Counsel to Debtor, and no party having objected to such application, and notice having

been given to all parties on the Debtor's service list and such notice being sufficient, and sufficient reason appearing to me therefor, it is hereby

ORDERED, ADJUDGED AND DECREED:

That the employment of Guy B. Moss, Esquire, and the firm of Widett, Slater & Goldman, P.C. as counsel to the Debtor is approved, effective of July 7, 1986.

(Harold Lavien) _____

Harold Lavien

Chief Bankruptcy Judge

